

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

**AERITAS, LLC,**

*Plaintiff,*

**v.**

**PANDA RESTAURANT GROUP, INC.**

**ET AL.,**

*Defendants.*

§  
§  
§  
§  
§  
§  
§  
§

**6:22-CV-01021-ADA-DTG**

**REPORT AND RECOMMENDATION OF THE  
UNITED STATES MAGISTRATE JUDGE**

**TO: THE HONORABLE ALAN D ALBRIGHT,  
UNITED STATES DISTRICT JUDGE**

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Before the Court is ECF No. 27, Defendants Panda Restaurant Group, Inc.’s and Panda Express Inc.’s Motion to Dismiss for Failure to Prosecute. Plaintiff Aeritas, LLC, filed a response in opposition. ECF No. 37. Defendants filed a Reply. ECF No. 39. This recommendation memorializes the Court’s ruling at the hearing on March 28, 2024. After careful consideration of the briefs, arguments of counsel, and the applicable law, the Court **RECOMMENDS** that the Motion be **DENIED**.

**I. LEGAL STANDARD**

Federal Rule of Civil Procedure 41(b) provides that “If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.” Fed. R. Civ. P. 41(b).

## II. ANALYSIS

While the delay in prosecuting this case is regrettable, it does not rise to the level requiring dismissal. Since the filing of Defendants' Motion, the Court held an initial pretrial conference and entered a Scheduling Order. ECF No. 30 (Minute Entry for IPTC); ECF No. 38 (current, operative schedule). The Court also held a Markman Hearing and ruled on the disputed terms for construction. Given the development of the case, dismissal for lack of prosecution would not be proper.

## III. RECOMMENDATION

For the above reasons, it is the **RECOMMENDATION** of the United States Magistrate Judge to the United States District Judge that the Defendants' Motion to Dismiss (ECF No. 27) be **DENIED**.

## IV. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. Parties filing objections must specifically identify those findings or recommendations to which they object. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v Arn*, 474 U.S. 140, 150–53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Except upon grounds of plain error, failing to object shall further bar the party from appellate review of

unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas*, 474 U.S. at 150–53; *Douglass*, 79 F.3d at 1415.

**IT IS SO ORDERED.**

**SIGNED** this 28th day of March, 2024.

  
DEREK T. GILLILAND  
UNITED STATES MAGISTRATE JUDGE